Local 201, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of Dutchess and Ulster Counties, New York, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO[1] ***and*** **Sheet Metal Workers International Association, Local 38, AFL-CIO** ***and*** **Shaker, Travis & Quinn, Inc.** ***and*** **Robert M. Saltzstein and Sheet Metal Workers International Association, Local 38, AFL-CIO, Party in Interest**

Sheet Metal Workers International Association, Local 38, AFL-CIO ***and*** **Robert M. Saltzstein and Local 201, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of Dutchess and Ulster Counties, New York, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, Party in Interest.** Cases 3-CD-548, 3-CD-549, 3-CD-550, and 3-CD-552

31 July 1985

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

The charge in Case 3-CD-548, a Section 10(k) proceeding, was filed 27 December 1982 by Sheet Metal Workers Local 38 alleging that the Respondent, Plumbers Local 201, violated Section 8(b)(4)(ii)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees the Respondent represents rather than to employees represented by the Sheet Metal Workers. The charges were filed in Cases 3-CD-549 and 3-CD-550, respectively, by the Employer 29 December 1982 and by Robert M. Saltzstein, as counsel for the Employer, 12 January 1983 alleging essentially the same violations as set forth in Case 3-CD-548. The charge in Case 3-CD-552 was filed by Saltzstein as counsel for the Employer 28 January 1983 alleging that the Sheet Metal Workers threatened the Employer within the meaning of Section 8(b)(4)(ii)(D) in order to secure assignments of the disputed work for employees represented by it and to avoid reassignment of the work to employees represented by the Plumbers. An order consolidating all four cases and a notice of hearing was issued 3 February 1983. The hearing was held on 8 separate days between 25 January through 14 April 1983 before Hearing Officer Christopher G. Roach.

[1] Respondent Plumbers name appears as amended at the hearing.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

The Employer, a New York corporation, is engaged in mechanical contracting at its facility in Poughkeepsie, where it annually derives gross revenues from its operation in excess of $50,000 and purchases goods, materials, and supplies valued in excess of $50,000 which are shipped to its Poughkeepsie, New York location directly from points outside the State of New York. The parties stipulate, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that Plumbers Local 201 and Sheet Metal Workers Local 38 are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. *Background and Facts of Dispute*

Prior to the relevant events herein the Employer was awarded two subcontracts from different general contractors of International Business Machines (IBM) at its East Fishkill, New York location. The work involved the fabrication and installation of boxes and enclosures made of plastic "PVC" or sheetmetal (also referred to as distribution boxes) used to enclose pipes to contain possible spills of corrosive or caustic liquids at two jobsites known as the raised floor job and the Knapp job. These boxes are commonly used to prevent the spilling of chemicals onto people or expensive equipment. In December 1982 the Employer assigned the fabrication of 250 boxes and 2 "p-trap" enclosures to the employees in its sheetmetal shop who were covered by a collective-bargaining agreement with the Sheet Metal Workers. The contract covered the period of 1 July 1982 through 30 June 1983.

The Employer assigned the installation and erection of these boxes and p-trap enclosures to the employees who were covered by a collective-bargaining agreement with the Plumbers. The contract covers the period of 1 July 1982 through 30 June 1984.

On 16 December 1982 Thomas Shaker, president of the Employer, had a conversation with Lou Quarisimo, business manager of the Plumbers, who requested that the fabrication of the boxes be assigned to the Plumbers. When Shaker replied that

the assignment of the work would not be changed, Quarisimo replied, "Well, maybe we won't put in the boxes." When Shaker noted that the installation of the boxes could be performed by members of the Sheet Metal Workers Quarisimo stated that the members of the Plumbers might refuse to connect the necessary piping.

On 3 January 1983 Charles Fitzpatrick, a plumbing foreman for the Employer and a member of the Plumbers, had a conversation with Melvin Tiger, the Employer's engineer, regarding the design of the two p-trap enclosures required for the Knapp job. Tiger prepared a diagram of the enclosures and informed Fitzpatrick that a member of the Sheet Metal Workers would fabricate them in the Employer's tinshop. Rather than wait to install the enclosures fabricated in the tinshop, Fitzpatrick informed his general foreman, George Galucci (also a member of the Plumbers), that he was going to make the enclosures on the jobsite and assigned the task to two plumbers. When the boxes fabricated in the tinshop were delivered to the jobsite, they were not installed by members of the Plumbers. The enclosures could not be located at the site for about a week and were finally discovered in a pipe fittings storage area. Meanwhile, the plumbers erected two enclosures which they had fabricated at the jobsite. Fitzpatrick admitted that he did not inform Tiger that he was not going to install the enclosures which had been fabricated in the tinshop.

On 22 December 1982 the U.S. District Court for the Southern District of New York issued a temporary restraining order preventing the Employer from assigning the fabrication of the boxes on the raised floor job to the Sheet Metal Workers. The court also ordered tripartite arbitration between the Employer and the two Unions over the raised floor job dispute. The temporary restraining order expired 2 January 1983 following a promise by the Employer to give Robert Cantore, attorney for the Plumbers, 48 hours' advance notice before fabricating the boxes. On 10 January 1983, after the Employer assigned the fabrication of the two enclosures on the Knapp job to the Sheet Metal Workers, Cantore informed Robert Saltzstein, attorney for the Employer, that the Plumbers reserved the right not to install prefabricated material. Cantore further related that the Employer "hasn't even seen a problem like he's going to see . . . that from today on, there is no more past practice," and that the Employer "is going to see problems now."

On 30 December 1983 the Sheet Metal Workers threatened via mailgram to "take all legal means of protecting its jurisdiction, including picketing" unless the Employer honored its work assignment of the fabrication of boxes on the raised floor job to it.

In February 1983 IBM canceled its contract for the raised floor job. On 7 April 1983 a revised contract was awarded to Mechanical Construction Corp. Mechanical requested subcontractor bids to fabricate and install distribution boxes and the Employer submitted a bid for the raised floor subcontract.

On 20 June 1983 the Court of Appeals for the Second Circuit vacated the district court's order compelling tripartite arbitration.

B. *Work in Dispute*

The work in dispute herein is the fabrication of sheetmetal and PVC plastic distribution boxes made for the raised floor construction project at the International Business Machines, Inc., East Fishkill, New York facility.

C. *Contentions of the Parties*

The Employer contends that there is reasonable cause to believe that the Plumbers has violated Section 8(b)(4)(ii)(D) of the Act, and that the record supports its assignment of the work in dispute to its employees represented by the Sheet Metal Workers.

Plumbers Local 201 contends that there is no jurisdictional dispute since IBM canceled the contract with the Employer. It asserts further that it had adequately disclaimed the work in question.

The Employer also contends that there is reasonable cause to believe that the Sheet Metal Workers has violated Section 8(b)(4)(ii)(D) of the Act by threatening to strike to prevent the Employer from assigning the work in dispute to employees represented by the Plumbers.

Sheet Metal Workers Local 38 contends that the Employer's decision to assign the fabrication of the boxes to its members was correct.

D. *Applicability of the Statute*

Before the Board may proceed with a determination of dispute pursuant to Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(ii)(D) has been violated.

As set forth above the record shows that the Plumbers threatened to use whatever lawful means available to force the Employer to assign the work to it, refused to install the prefabricated containment boxes, and interfered with the completion of the disputed work because the Employer refused to assign the work in dispute to employees represented by the Plumbers. The Plumbers position as

stated at the time of the work stoppage was that the Employer was taking work away from members of the Plumbers who work for mechanical contractors and that members of the Plumbers should be doing containment box fabrication work. Counsel for the Plumbers declined to disclaim the disputed work because he asserted that the collective-bargaining agreement mandated that the "erection" of containment or distribution boxes be assigned to its members. Counsel contended (apparently based on a dictionary interpretation of a portion of the agreement) that the word "erection" was synonymous with the word "fabrication," and thus the fabrication of such boxes must be performed by members of the Plumbers. Based on the foregoing undisputed facts and the record as a whole, we find that an object of the Plumbers work stoppage and threats was to force or require the Employer to assign the disputed work to individuals represented by the Plumbers. Accordingly, we find that reasonable cause exists to believe that the Plumbers violated Section 8(b)(4)(ii)(D) of the Act.

The record also shows that the Sheet Metal Workers asserted a claim to the work in dispute and threatened to take all legal recourse necessary, including picketing, to secure the assignments of the work to employees represented by the Sheet Metal Workers. A mailgram to this effect was dispatched by the Sheet Metal Workers to the Employer 30 December 1982. Based on the foregoing undisputed facts and the record as a whole, we find that an object of the Sheet Metal Workers threats was to force or require the Employer to assign the disputed work to individuals represented by the Sheet Metal Workers. Accordingly, we find that reasonable cause exists to believe that the Sheet Metal Workers violated Section 8(b)(4)(ii)(D) of the Act. At no time during the hearing or subsequent thereto did the Sheet Metal Workers disclaim the work in dispute.

The Board has held that an effective renunciation of the disputed work resolves the jurisdictional dispute. On finding an effective disclaimer of the work at the sites where the dispute arose and on finding no evidence from which it could reasonably be inferred that the respondent union intended to secure the disputed work as future jobsites, the Board has ordered that the notice of hearing be quashed.[2] However, here counsel for the Plumbers refused to disclaim the disputed work at the hearing[3] and insisted that Plumbers would use whatever legal means available to secure the work for its members. (This included seeking a district court temporary restraining order and an order to compel arbitration.)[4]

The Plumbers further argues that there is no jurisdictional dispute inasmuch as the work in dispute has been completed in part and the remainder will no longer be performed by the Employer since IBM terminated its contract and accepted another company's bid to perform the work. The Board frequently has held that the completion of the work involved does not render a jurisdictional dispute moot where there is evidence of similar disputes between the parties in the past or nothing to indicate that such disputes will not occur in the future.[5] Here the record indicates that the Employer bid on a subcontract to perform the work in dispute for the new prime contractor. In light of the above and the Plumbers ineffective disclaimer we find that the instant case is not moot.

We find reasonable cause to believe that a violation of Section 8(b)(4) (ii)(D) has occurred in the consolidated cases and that there exists no agreed method of voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act. Accordingly, we find that the dispute is properly before the Board for determination.

E. *Merits of the Dispute*

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402 (1962).

The following factors are relevant in making the determination of this dispute.

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[2] *Laborers Local 66 (Georgia-Pacific)*, 209 NLRB 611 (1974), and *Sheet Metal Workers Local 55 (Gilbert L. Phillips, Inc.)*, 213 NLRB 749 (1974).

[3] The Board has repeatedly refused to give effect to a hollow disclaimer, that is, a disclaimer presented for the purpose of avoiding an authoritative decision on the merits. See, e.g., *Plumbers Local 703 (Airco Carbon)*, 261 NLRB 1122 (1982), where the Board gave no effect to a disclaimer tendered on the final day of the hearing noting that most of the work had been completed and there was little left to disclaim. Here, counsel for the Plumbers, after concluding that the work had been completed as far as it concerned the Employer, offered to disclaim the work if it were "technically necessary" in an attachment to its posthearing brief dated 2 months after the final day of the hearing. We conclude that such an attempted disclaimer is indeed hollow and no disclaimer at all.

[4] The Second Circuit Court of Appeals vacated the order compelling tripartite arbitration 20 June 1983.

[5] See, e.g., *Sheet Metal Workers Local 541 (Kingery Construction)*, 172 NLRB 1046, 1049 (1968), and *Sheet Metal Workers Local 9 (Elward, Inc.)*, 250 NLRB 724, 729 (1980).

1. Certification and collective-bargaining agreements

Neither of the labor organizations herein involved has been certified as the collective-bargaining representative for a unit of the Employer's employees nor is there evidence indicating that a Board certification covers the work in dispute.

The collective-bargaining agreement between the Employer and the Sheet Metal Workers provides that the Union is the exclusive representative of those employees of the Employer who are engaged in the "manufacture, fabrication, assembling, handling, [and] erection . . . of all ferrous or nonferrous metal work and all other materials used in lieu thereof [and] . . . the preparation of all shop and field sketches used in fabrication and erection." The Sheet Metal Workers trade jurisdiction as set forth in its International constitution was incorporated by reference into the collective-bargaining agreement and states that the Union claims full jurisdiction over the "fabarication of all sheetmetal work . . . formed in brake or press and . . . the makings of all connections whether screwed . . . welded or otherwise fastened [and] all sheetmetal work used in connection with or incidental to the equipment and operation of . . . manufacturing plants, including . . . pipes and fittings . . . in connection with or incidental to the operating thereof [and] all types of sheetmetal work in connection with industrial work including . . . chemical and similar type plants . . . including . . . all sheetmetal drip pans." Plastics are also included in the claimed jurisdiction when used as a replacement for sheetmetal.

The collective-bargaining agreement between the Employer and the Plumbers provides that the Plumbers Local is the exclusive representative of those employees of the Employer who are engaged in: "The laying out and cutting of all holes, chases and channels, the setting and erection of booths, inserts, stands, brackets, supports, sleeves, thimbels, hangers, conduit and boxes, used in connection with pipe fitting industry." Section 19 of the agreement provides: "The Local Union reserves the right to refuse to handle, erect or install fabricated material sent to the job that has not been fabricated by Journeymen members of the United Association."

The Plumbers Local contends that the words "erection" and "fabricate" are synonymous and that the contract clearly gives them the right to make and install sheetmetal boxes and containment devices when it refers to the "setting and erection of . . . boxes." However, this contract is far from clear. The Board has made a distinction between the terms "prefabrication" and "erection."[6] We note in the instant case that the estimators guide for mechanical contractors used by the Employer breaks down estimates by erection time and by shop fabrication time. Even if the two terms were used interchangeably as asserted by the Plumbers, the local agreement would make little sense in its reservation clause. In that case the Plumbers Local would "reserve the right to refuse to . . . fabricate [erect] . . . fabricated material sent to the job that has not been fabricated by Journeymen." The logical conclusion is that the terms are not synonymous and we conclude therefore that consideration of the collective-bargaining agreements favors assignment of the work to employees represented by the Sheet Metal Workers.

2. Company preference and past practice

After a consideration of all the relevant facts the Employer assigned the work of fabricating the distribution boxes to employees represented by the Sheet Metal Workers. The record indicates that Shaker, Travis & Quinn, Inc. is satisfied with the results of its assignment and maintains a preference for an assignment of the work to members of the Sheet Metal Workers.

It is the Employer's consistent practice to assign the fabrication of metal and plastic spillage containers, troughs, and enclosures to its employees who are represented by the Sheet Metal Workers. Although the record indicates that the distribution boxes here in question are a relatively new technology with respect to the "pipe within a pipe" systems, the basic function of these boxes is to prevent spillage of caustic or corrosive chemicals. That is also the basic function of the other containers, troughs, etc., which have traditionally been fabricated by employees represented by the Sheet Metal Workers. On the basis of the above findings we conclude that the Employer's preference and past practice favor assignment of the work in dispute to employees represented by the Sheet Metal Workers.

3. Area and industry practice

The record clearly establishes that different employers in the area, including employers at the same jobsite, have consistently assigned the fabrication of metal enclosures and containment devices, such as protective piping enclosures, to sheetmetal workers. The Plumbers produced no examples of assignment of such work or similar work to employees represented by the Plumbers. We conclude that the area and industry practice favors assign-

[6] *Bricklayers Local 18 (Tobasco Concrete)*, 169 NLRB 1085 (1968).

ment of the work in dispute to employees represented by the Sheet Metal Workes.

4. Relative skills

The record establishes that: (1) the Employer's sheetmetal workers possess the necessary skills to perform the work in dispute and (2) journeymen plumbers represented by the Plumbers are not sufficiently skilled to perform the disputed work. The record also indicates that the Employer is satisfied with the performance of the work in dispute by its employees represented by the Sheet Metal Workers.

Specifically, the record shows that the work of the Employer's sheetmetal workers is significantly different from the work performed by journeymen plumbers in terms of training and techniques required. The journeymen sheetmetal worker has completed 4 years of training and practice as an apprentice and receives 160 hours per year training at the apprenticeship school. They are specifically trained in the use of power tools including the power shear, the power brake, and the MIG (inert gas) welder, all of which are used in the fabrication of the distribution boxes in question. No plumber who testified had any ability to properly operate the equipment. While the Plumbers argued that it should have had access to the power equipment in the Employer's sheetmetal shop, the Employer's engineer, Tiger, testified without contradiction that it takes at least 21 hours to teach an apprentice how to use the power brake. Although the record supports the contention of the Plumbers that the distribution boxes can be manufactured by handtools, it is undisputed that this method takes about five times as long to complete. We find that consideration of the factors of skill and special training favors assignment of the disputed work to the employees of the Employer who are represented by the Sheet Metal Workers.

5. Economy and efficiency of operation

The record indicates that an assignment of the work in dispute to employees represented by the Plumbers would result in a substantial loss of economy and efficiency to the Employer. Testimony indicates that it would take about 1 hour and 13 minutes to fabricate a "p-trap enclosure" in the Employer's sheetmetal shop. The same enclosure which was actually fabricated by the Plumbers at the jobsite took over 7 hours. Through the use of the power shears, power brake, and MIG welder, all of which the journeyman sheetmetal worker is familiar with, many of the components for the enclosures can be fabricated at one time saving unnecessary repetition. It is uncontroverted that using members of the Plumbers to fabricate the boxes would increase the Employer's labor cost considerably above what it would cost to have sheetmetal workers perform the work. We find that the factors of both economy and efficiency support an award of the work in the dispute to employees represented by the Sheet Metal Workers.

Conclusions

After considering all the relevant factors, we conclude that employees represented by the Sheet Metal Workers are entitled to perform the work in dispute. We reach this conclusion relying on the collective-bargaining agreement between the Sheet Metal Workers and the Employer; employer preference; industry and area practice; the requisite skills and training possessed by sheetmetal workers; and the efficiency and economy of operations. In making this determination, we are awarding the work to employees represented by Sheet Metal Workers Local 38, not to that Union or its members.

Scope of Determination

The Employer requests that the Board determine the dispute by awarding the disputed work to its employees represented by the Sheet Metal Workers and further requests that the Board's determination apply to the geographic jurisdiction of Plumbers Local 201.

It has been the Board's policy to make an award broad enough to encompass the geographic area in which an employer does business wherever jurisdiction of competing unions coincide, in circumstances where there is an indication that the dispute is likely to recur.[7] However, here there is no evidence of any disputes between the Plumbers and the Employer in the past or any evidence that such a dispute is likely to recur in the future. Therefore, our determination in this case is limited to the instant dispute.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

1. Employees of Shaker, Travis & Quinn, Inc., represented by Sheet Metal Workers International Association, Local 38, AFL-CIO are entitled to perform the fabrication of distribution boxes, p-trap enclosures, and other similar devices constructed of sheetmetal or its substitutes for the containment of possible liquid spillage at the Employer's jobsites at the IBM East Fishkill, New York facility.

[7] *Iron Workers Local 290 (Israel Builders)*, 223 NLRB 790, 793 (1976).

2. Local 201, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of Dutchess and Ulster Counties, New York, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO is not entitled by means proscribed by Section 8(b)(4)(ii)(D) of the Act to force Shaker, Travis & Quinn, Inc. to assign the disputed work to employees represented by it.

3. Within 10 days from this date, Local 201, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of Dutchess and Ulster Counties, New York, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO shall notify the Regional Director for Region 3 in writing whether it will refrain from forcing the Employer, by means proscribed by Section 8(b)(4)(ii)(D), to assign the disputed work in a manner inconsistent with this determination.